75-1523

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. A-841

Marlane Karr,

Petitioner

v.

State of Ohio,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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Petitioner, Marlane Karr, respectfully prays that a writ of certiorari issue to review the opinion and judgment of the Supreme Court of the State of Ohio rendered in these proceedings on December 24, 1975.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio reported at 44 Ohio St. 2d, 163 is printed in the appendix at Page 20 . The opinion of the Court of Appeals of Franklin County, Ohio, is unreported and appears in the appendix at Page 2 .

The conviction of the Defendant on June 17, 1974 in the Court of Common Pleas of Franklin County, Ohio, was reversed by the Franklin County Court of Appeals and the Supreme Court of Ohio reversed the judgment of the Court of Appeals.

JURISDICTION

The judgment of the Supreme Court of the State of Ohio was entered on December 24, 1975. On March 26, 1976, Justice Stewart granted an extension of time within which to file a Petition for a Writ of Certiorari, up to and including April 22, 1976.

A timely notice of appeal to the Supreme Court of the United States was filed in the Supreme Court of the State of Ohio on March 19, 1976.

This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Supreme Court of Ohio in reversing the Franklin County Court of Appeals of Ohio, eliminated probable cause for the issuance of a search warrant as required by Article 1, Section 2, of the Constitution of the State of Ohio, Fourth

Amendment of the Constitution of the United States, and therefore deprive the Petitioner of Due Process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States?

2. Whether the Supreme Court of Ohio improperly interpreted this Court's cases with the resulting affect of a citizen of the State of Ohio becoming the victim of a "rubber-stamp issuance of search warrants"?

CONSTITUTIONAL PROVISIONS INVOLVED

1) Constitution of the United States, Amendment Four:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and persons or things to be seized."

2) Constitution of the United States, Amendment Fourteen, Section 1:

"...nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3) Article 1, Section 14, Constitution of Ohio:

"The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated; and

no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized."

STATEMENT OF THE CASE

The facts relevant to the question presented by this Petition was that the Petitioner was charged with illegal possession of amphetamines and of barbituates and the Court of Common Pleas of Franklin County overruled the Petitioner's Motion to Suppress Evidence obtained by a search pursuant to a search warrant. The Petitioner entered a plea of "No Contest" and was found guilty.

The affidavit for the issuance of the search warrant contained the following:

"The facts upon which such belief is based are as follows: information received from a reliable informant, who has given reliable and factual information in the past which has led to several arrests, states that he/she has seen large quantities of miscellaneous amphetamines and barbituates inside the above address in the past 48 hours. Because of the high mobility and the amount of traffic in and out of the premises, Det. Casserly believes that it is necessary to execute the search warrant at night time."

No other information was submitted to the issuing magistrate.

The Petitioner filed an appeal to the Franklin County Court of Appeals and the trial court was reversed, see appendix Page 2.

The State of Ohio appealed the decision of the Franklin County Court of Appeals and the Court of Appeals was reversed, see appendix Page 20 , infra.

REASONS FOR GRANTING THE WRIT

I

THE DECISION OF THE SUPREME COURT OF OHIO DIRECTLY CONFLICTS WITH THE PRINCIPLES ENUNCIATED BY THIS COURT AS TO ISSUANCE OF SEARCH WARRANTS BY AN INCORRECT INTERPRETATION OF THE CASES RULED UPON BY THIS COURT.

The Supreme Court of Ohio, interpretes the Jones v. United States, (1960), 362 U.S. 257; Aguilar v. Texas, (1964), 378 U.S. 108; Spinelli v. United States, (1969), 393 U.S. 410, and United States v. Ventresca, (1965), 380 U.S. 102, as guidelines for the issuance of a search warrant for probable cause. Certainly it cannot and must not be the law of this land that a person's home is subject to intrusion and search by the issuance of a warrant my a magistrate who has nothing before him but anemic suspicion. An affidavit for the issuance of the search warrant containing 48 words, (see Appendix "A") and nothing else presented relative to probable cause can only mean the Fourth Amendment of the United States Constitution and Article I, Section 2 of the Ohio Constitution are meaningless and subject to a "rubber-stamp" approval of the police power.

The Court of Appeals of Franklin County, Ohio, in its decision correctly interpreted the law and also stated: "The positive hoped for resultant of the philosophy of this decision, and others in the same vein, will be to guard against the rather bland sameness, and somewhat indefiniteness, of the standard boiler plate affidavit." (See Appendix "B", page 18.)

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Ohio Supreme Court.

Respectfully submitted,

JAMES V. ROSE,
Counsel for Petitioner
50 West Broad Street
Columbus, Ohio 43215
614/224-8411

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served upon the office of the Prosecuting Attorney, Hall of Justice, Mound and High Streets, Columbus, Ohio,by placing same in the U.S. mail, postage pre-paid, this 26th day of April, 1976.

JAMES V. ROSE,
Counsel for Petitioner

APPENDIX "A"

SEARCH WARRANT - AFFIDAVIT
THE STATE OF OHIO,
FRANKLIN COUNTY, ss: Franklin County Municipal
CITY OF COLUMBUS Court, Columbus, Ohio

Before me, the undersigned, a Judge of Franklin County Municipal Court, Columbus, Ohio, personally appeared Ronald Casserly #39, who being duly sworn according to law, deposes and says that he has good cause to believe and does believe that Amphetamines and Barbiturates and other drug related paraphernalia, and papers indicating occupancy, residence or ownership, are being kept in a certain building or room known as 1606 W. Mound St. & Curtilage in said City of Columbus, Ohio, for the purpose of illegal keeping, use and/or sale

The facts upon which such belief is based are as follows: Information received from a reliabl informant, who has given reliable and factual information in the past which has led to several arrests, states that he/she has seen large quantities of miscellaneous amphetamines and barbiturates inside the above address in the past 48 hours. Because of the high mobility and the amount of traffic in and out of the premises, Det. Casserly believes that it is necessary to execute the search warrant at nighttime.*

*Portions underscored indicate the material filled in on the original form.

"APPENDIX B"

IN THE COURT OF APPEALS OF FRANKLIN COUNTY,OHIO

State of Ohio, :

Plaintiff-Appellee, :

v. : No. 74AP296

Marlane E. Karr, :

Defendant-Appellant. :

D E C I S I O N

Rendered on December 17, 1974

MR. GEORGE C. SMITH, Prosecuting Attorney,
MR. ALAN C. TRAVIS, Assistant,
Franklin County Hall of Justice,
369 South High Street,
Columbus, Ohio,
For Plaintiff-Appellee

MR. JAMES V. ROSE,
50 West Broad Street,
Columbus, Ohio
For Defendant-Appellant.

WHITESIDE, J.

Defendant appeals from her conviction in the Franklin County Court of Common Pleas, following a no-contest plea to one count of possession of amphetamines and one count of possession of barbiturates in violation of R.C. 3719.24(D). Two other counts in the

indictment were dismissed.

Prior to defendant's change of plea from not guilty to no contest, with respect to the two counts, the trial court overruled defendant's motion to suppress certain evidence. Defendant raises four assignments of error relating to the overruling of the motion to suppress, and a fifth relating to bail on appeal.

Defendant also raises a sixth assignment of error contending that:

> "The Court erred in failing to consolidate counts two and three of the indictment since the possession of the narcotics (sic) in question occurred at one time and place within a single transaction."

The plaintiff, state, concedes that the sixth assignment of error is well taken in light of this court's unreported decision rendered in State v. Greene, No. 73AP-334, Court of Appeals for Franklin County, February 26, 1974 (1974 Decisions, page 446). In view of the state's agreement that the sixth assignment of error should be sustained, we find it to be well taken.

By the second assignment of error, defendant contends that:

> "The Court erred in not sustaining the motion to suppress the evidence, for the failure of the police officer to comply with the mandatory requirements of Rule 41, Rules of Criminal Procedure."

Defendant contends that the motion to suppress should be sustained because the return of the search warrant was not accompanied by a verified written inventory of the property

taken as required by Crim.R. 41(D).

In the unreported decision rendered in State v. Moretti, No. 73AP-440, Court of Appeals for Franklin County, April 9, 1974 (1974 Decisions, page 817), this court held that the failure of a police officer to comply with virtually identical provisions in R.C. 2933.241, with respect to an inventory, did not require per se exclusion of the evidence seized pursuant to the search warrant, relying upon State v. Johnson (1960), 112 Ohio App. 124; People v. Hawthorne (1970), 45 111. 2d 176, 258 N.E. 2d 319; United States v. Wilson (1971), 451 F. 2d 209; United States v. Haskins (1965), 345 F. 2d 111; State v. Cortman (1968), 446 P.2d 681, and refusing to follow State v. Bowland (1971), 29 Ohio Misc. 176. In Moretti, we stated in part, at page 824-825:

> "In this instance, there is a lawful search and seizure, but the complaint is that there was a failure to comply with a subsequent related requirement which does not constitute part of the search and seizure but is to be performed only once the search and seizure is completed. We do not condone the failure of the police officer to perform his statutory duty. However, there is no reason to penalize the public because of the failure of a police officer to perform this type of duty. There is no prejudice to the defendant that is inherent in the failure of the officer to file an inventory. Unlike the case of an unlawful search and seizure in violation of constitutional safeguards, the failure of an officer to file an inventory does not violate any fundamental rights of the defendants.
>
> "The failure of the officer to file an

inventory may give rise to problems concerning admissibility of evidence if a question arises as to the identity of the property seized pursuant to a search warrant, but a per se exclusionary rule is neither required nor warranted.***"

We further note that the return of warrant (defendant's exhibit A) contains a listing of the articles found, and apparently seized, but is not verified. The second assignment of error is not well taken.

By the third assignment of error, defendant contends that:

"The Court erred in not holding the search warrant insufficient since the warrant failed to provide a particular description of the place or premises to be searched, either by name or particular portion of the structure to be searched."

The premises to be searched were described in the warrant as "1606 W. Mound St. & Curtilage." The evidence indicates that the building involved consisted of a residence plus a business downstairs and a residence upstairs. The search was conducted of the residence and business downstairs, occupied by defendant, apparently for residence purposes and the conduct of a poodle-clipping business. The testimony further indicates that there is a side door that goes to the upstairs apartment. There is no indication as to whether the address of the upstairs apartment is the same as that for the main floor. The evidence also justifies a finding that the business and residence on the first floor constitute a single unit or premises. The trial court was justified in finding that the search warrant adequately described the

place to be searched to comply with the requirement of CrimR. 41(C), that the affidavit "particularly describe the place to be searched." The third assignment of error is not well taken.

By her fourth assignment of error, defendant contends that:

> "The Court erred in not sustaining the motion to suppress based upon the night time search of the Defendant's premises."

In the affidavit, it was stated that the affiant officer believed a night time search necessary "because of the high mobility and the amount of traffic in and out of the premises." Although this may offer a tenuous basis for a search late at night, the search herein was conducted before 8:55 p.m. Crim.R. 41(F) defines daytime as meaning from 7 a.m. to 8 p.m. Crim. R. 41(C) requires that "the warrant shall be served in the daytime, unless the issuing court, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime." While it would have been preferable that the trial court had specifically limited the nighttime search to a reasonable time after 8 p.m., the actual search was conducted within a reasonable time thereafter. Whether to authorize a nighttime search lies within the sound discretion of the issuing judge. Here, under all the attendant circumstances, we find no abuse of that discretion. The fourth assignment of error is not well taken.

By the fifth assignment of error, defendant contends that:

"The Court erred in requiring the Defendant to pose Two Thousand Dollars cash bail for purposes of appeal."

Crim R. 46(E)(2) makes it mandatory that a person who has been convicted of a misdemeanor shall be released on bail during the pendency of an appeal from his conviction in accordance with the provisions of Crim. R. 46(C). The trial court should impose conditions of release which will reasonably assure appearance of the defendant for execution of sentence if the judgment is affirmed upon appeal. The trial court released defendant on bail but, in addition to a surety bond previously posted as bail pending trial, the trial court required a recognizance bond in the amount of $2,000.00 and a cash bond in the same amount. These requirements are consistent with Crim.R. 46(C) as to conditions of release that the trial court may require. Furthermore, Crim.R. 46(J) provides that:

"***In the discretion of the trial court, and upon notice to the surety, the same bond may also continue after final disposition in the trial court and pending sentence or pending disposition of the case on review.***"

There is no automatic continuance of the same bond or conditions of release upon appeal. Rather, Crim.R. 46(H) specifically provides that:

"Subject to subdivisions (C) and (G), a judge ordering the release of a person on any conditions specified in this rule may at any time amend his order to impose additional or different conditions of release."

The criteria to be used in determining the conditions of release are set forth in Crim. R. 46(F) as follows:

> "In determining which conditions of release will reasonably assure appearance, the judge shall, on the basis of available information, take into account the nature and circumstances of the offense charged, the weight of the evidence against the accused, the accused's family ties, employment, financial resources, character and mental condition, the length of his residence in the community, his record of convictions, and his record of appearance at court proceedings or of flight to avoid prosecution or of failure to appear at court proceedings."

Under the circumstances hereof, we find no abuse of discretion in the conditions of release fixed by the trial court pending appeal to this court.

Defendant relies upon R.C. 2953.051 which provides that, following a conviction of a misdemeanor, "the defendant shall continue on the same bail" during the pendency of an appeal unless a new or additional bond is ordered for good cause shown. Such statute has been superseded by Crim.R. 46 to the extent that there are any inconsistencies. Furthermore, R.C. 2953.051 also places the question of whether new or additional bonds should be required within the sound discretion of the trial court.

Although there is doubt that this matter is the proper subject of review upon appeal, we have considered the assignment of error and find it not to be well taken.

By the first assignment of error,

defendant raises a more vexing problem, contending that:

> "The Court erred by not sustaining the motion to suppress the evidence obtained by a defective search warrant."

In support of this assignment of error, defendant contends that the affidavit upon which the search warrant was issued, there being no oral testimony presented to the issuing judge, was insufficient to show probable cause for issuance of the search warrant. The affidavit alleges as follows: (Material in italics is the wording on the printed form.)*

> "Before me, the undersigned, a Judge of Franklin County Municipal Court, Columbus, Ohio, personally appeared Ronald Casserly #39 who being duly sworn according to law, deposes and says that he has good cause to believe and does believe that Amphetamines and Barbiturates and other drug related paraphernalia, and papers indicating occupancy, residency or ownership are being kept in a certain building or room known as 1606 W. Mound St. & Curtilage in said City of Columbus, Ohio, for the purpose of illegal keeping, use and/or sale. The facts upon which such belief is based are as follows: Information received from a reliable informant, who has given reliable and factual information in the past which has led to several arrests, states that he/she has seen large quantities of miscellaneous amphetamines and barbiturates inside the above address in the past 48 hours. Because of the high mobility and the amount of traffic in and out of the premises, Det. Casserly believes that it is necessary to execute the search warrant at nighttime."

*Portions underscored indicate the material in italics in the original decision.

The basic test which must be applied in determining whether an affidavit for a search warrant is sufficient to meet constitutional standards are established by Aguilar v. Texas (1964), 378 U.S. 108; 84 S.Ct. 1509, and Spinelli v. United States (1968), 393 U.S. 410; 89 S.Ct. 584. The appropriate test to be applied is set forth in Aguilar, at page 1514, as follows:

> "Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant [citation omitted], the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed [citation omitted], was 'credible' or his information 'reliable.'"

Accordingly, an affidavit for a search warrant predicated upon information obtained from an informant, whether disclosed or undisclosed, seeking search of a premises for illegal drugs, must contain two basic types of information: (1) facts constituting underlying circumstances from which the informant concluded that the drugs were where he claimed they were, and (2) facts indicating some of the underlying circumstances justifying a conclusion by the officer that the informant was credible or his information reliable. It could be argued from Aguilar and Spinelli that the tests are met if the affidavit indicates that the informant had direct

first-hand personal knowledge of the facts if those facts would be sufficient for issuance of a search warrant. In this case, the affidavit indicates that the informant "has seen large quantities of miscellaneous amphetamines and barbiturates inside the above address in the past 48 hours." Thus, in Aguilar, it is stated at page 1513:

> "***Here the 'mere conclusion' that petitioner possessed narcotics was not even that of the affiant himself; it was that of an unidentified informant. The affidavit here not only 'contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein,' it does not even contain an 'affirmative allegation' that the affiant's unidentified source 'spoke with personal knowledge.' For all that appears, the source here merely suspected, believed or concluded that there were narcotics in petitioner's possession.***"

In Spinelli, it is stated at page 589:

> "***Though the affiant swore that his confidant was 'reliable,' he offered the magistrate no reason in support of this conclusion. Perhaps even more important is the fact that Aguilar's other test has not been satisfied. The tip does not contain a sufficient statement of the underlying circumstances from which the informer concluded that Spinelli was running a bookmaking operation. We are not told how the FBI's source received his information -- it is not alleged that the informant personally observed Spinelli at work or that he had ever

placed a bet with him. Moreover, if the informant came by the information indirectly, he did not explain why his sources were reliable. [Citation omitted.] In the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip describe the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation."

The Supreme Court of Ohio, however, has ruled that merely stating that the informant's information was based upon his direct personal first-hand knowledge is not sufficient. State v. Joseph (1971), 25 Ohio St. 2d 95, and State v. Brehm (1971), 27 Ohio St. 2d 239. In Joseph, the affidavit stated that there had been a purchase of marijuana made through an informant and that three named individuals had smelled the odor of burning marijuana emanating from the premises involved. The Supreme Court held that these allegations were insufficient to meet the Aguilar test, stating at page 97 of the per curiam decision:

> "***The allegations are unilluminated by any underlying curcumstances upon which the informants based their conclusions and are devoid of underlying circumstances from which the affiant-officer could have concluded that the informants were credible, or their information reliable."

In Brehm, the affidavit alleged that an informant had purchased drugs and had seen

drugs used and sold at a certain address. The Supreme Court held that this was insufficient to meet either of the tests set forth in Aguilar. We are not free to apply our own interpretation of Aguilar and Spinelli but must apply the tests as interpreted by the Ohio Supreme Court in Joseph and Brehm. Accordingly, the allegation that the informant, within the past 48 hours, had seen large quantities of amphetamines and barbiturates in the premises in question must be held to be insufficient to meet the Aguilar test.

In the plurality opinion in United States v. Harris (1971), 403 U.S. 573; 91 S.Ct. 2075, it is stated at page 2082:

> "Quite apart from the affiant's own knowledge of respondent's activities, there was an additional reason for crediting the informant's tip. Here the warrant's affidavit recited extra-judicial statements of a declarant, who feared for his life and safety if his identity was revealed, that over the past two years he had many times and recently purchased 'illicit whiskey.' These statements were against the informant's penal interest, for he thereby admitted major elements of an offense under the Internal Revenue Code.
>
> "Common sense in the important daily affairs of life would induce a prudent and disinterested observer to credit these statements. People do not lightly admit a crime and place critical evidence in the hands of the police in the form of their own admissions. Admissions of crime, like admissions against proprietary interests, carry their own indicia of credibility--sufficient at least to support a finding of probable

> cause to search. ***Concededly admissions of crime do not always lend credibility to contemporaneous or later accusations of another. But here the informant's admission that over a long period and currently he had been buying illicit liquor on a certain premises, itself and without more, implicated that property and furnished probable cause to search."

Here, we have no admission of crime by the informant. In Joseph and Brehm, the Ohio Supreme Court did not consider the implied admissions to be sufficient to establish probable cause.

We cannot expect a police officer drafting an affidavit in the midst and haste of a criminal investigation to meet the standards of a skilled lawyer, and must test and interpret the affidavit in a commonsense and realistic manner. However, we should expect a higher standard from the issuing judge who, under Crim.R. 41(C), has the right and duty of requiring additional evidence beyond that contained in the affidavit, if necessary to support a finding of probable cause.

The issuing judge must insist upon receiving sufficient evidence, whether in the affidavit or otherwise, which shows both: (1) a substantial basis for believing the source of hearsay to be credible, and (2) a substantial basis for believing there is a factual basis for the information furnished. The issuing judge may not rely upon mere conclusions of the police officer but must predicate his finding upon evidence that enables him to make an independent judicial determination of probable cause.

We further note that the affidavit sets forth no underlying circumstance from which the informant concluded that that which he saw on the premises were, in fact, amphetamines or barbiturates. Also, at the hearing upon the motion to suppress, the affiant officer testified, but did not specifically state that the informer told him amphetamines and barbiturates were on the premises. When specifically asked as to the conversation with the informant, he stated that he talked to the informant on the telephone and that the informant told him that he had seen a large quantity of pills inside the premises.

As the the reliability or credibility of the informant, the affidavit alleges that the informant "has given reliable and factual information in the past which has led to several arrests." The affidavit does not state directly that the past information supplied by the informant had proved to be factual and true but merely stated that the information led to several arrests, indicating that the police officers involved believed the information. Neither does the affidavit indicate that the past information or arrest related to drugs. In this regard, this case is to be distinguished from the recent unreported decision rendered in State v. Parker, No. 74AP-83, Court of Appeals for Franklin County, September 17, 1974 (1974 Decisions, page 2389), in which the affidavit alleged that the informant "has given information in the past which has proved to be factual and true."

At the motion to suppress hearing, the officer testified that he had talked to the informant on several times and that, on one occasion, the informant took the affiant officer and his partner to an address where his partner purchased ten pounds of marijuana and arrested five people. Unfortunately, this information was not included in the

affidavit nor related to the issuing judge, so that it cannot be considered as bolstering the statement in the affidavit concerning the credibility and reliability of the informant. Although this additional information, which cannot be considered, indicates that the prior information and arrest concerned drugs, it involved marijuana, rather than amphetamines or barbiturates.

In State v. Haynes (1971), 25 Ohio St. 2d 264, Chief Justice O'Neill stated, at page 268 of the opinion:

> "Reliability and credibility are nebulous matters. No exact rule can be laid down as a guideline for the determination of such questions. Each case must be judged upon its own merits.
>
> "Although the fact that the informant has previously supplied reliable information carries some weight, the determination of reliability or credibility can not be cased solely upon that fact.***"

Although in Parker, supra, the majority of this court held that the affidavit was sufficient, the affidavit herein does not supply as great an indication of reliability and credibility as that in Parker.

In Haynes, the Supreme Court held an affidavit was sufficient, which recited (first paragraph of the syllabus):

> "***(1) the name of the informant; (2) that the informant had identified a picture of the lessee of the premises sought to be searched; (3) that the informant had on three separate occasions within a three week period purchased substances on the premises

sought to be searched; and (4) that those substances were turned over to police and upon analysis the substances were shown to be marijuana."

Haynes supplies no basis for finding the affidavit herein to be sufficient since none of the factors the Supreme Court found to make the Haynes affidavit sufficient are present in the affidavit herein.

Accordingly, we conclude that the affidavit herein does not meet the requirements set forth by the United States Supreme Court in Aguilar and Spinelli as interpreted and applied by the Ohio Supreme Court in Joseph, Haynes and Brehm to support the issuance of a search warrant. The trial court should have sustained the motion to suppress; the first assignment of error is well taken.

For the foregoing reasons, the first and sixth assignments of error are sustained, and the remaining assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is reversed, and this cause is remanded to that court for further proceedings in accordance with law consistent with this decision.

Judgment reversed and remanded.

STRAUSBAUGH, J., concurs.
HOLMES, J., concurs separately.

HOLMES, J., concurring separately.

Upon a general review and reevaluation of the applicable federal and state law within this area, dealing with the subject of the contents of affidavits as relied upon by magistrates in issuing warrants for search and possible seizure, I arrive at the basic

determination that we in Ohio, by way of the decisions of our Supreme Court, in Joseph, Brehm and Haynes, supra, are more definitive and exacting in the necessary requirements for affidavits than is required by the decisions of the United States Supreme Court in Aguilar and Spinelli, supra.

I must agree with the majority statement herein that we are not free to apply our own interpretation of Aguilar and Spinelli, but must apply the tests as interpreted by the Ohio Supreme Court in Joseph, Brehm and Haynes.

Accordingly, I must concur that the allegations that "the informant within the past 48 hours had seen large quantities of amphetamines and barbiturates in the premises in question" must be held to be insufficient to meet the prevailing tests for showing the underlying circumstances upon which the informant based his conclusion.

It has always been my belief that the constitutional guarantee of the right of protection from illegal search and seizure should be steadfastly maintained. However, it has been my companion view that the instruments which seek the legal sanction for such search must, as stated in United States v. Ventresca (1965), 380 U.S. 102, "be tested and interpreted by magistrates and courts in common-sense and realistic fashion."

The positive hoped for resultant of the philosophy of this decision, and others in the same vein, will be to guard against the rather bland sameness, and somewhat indefiniteness, of the standard boiler plate affidavit.

Such instant determination, also as stated by Judge Whiteside, shall hopefully have the

additional salutary effect of additional information being given, either voluntarily or by request, to the magistrate who is being asked to issue such affidavit, and that such information either be stenographically or electronically recorded for review purposes.

Based upon my referred to reflections upon the state of the law in this specific area, I must concur.

"APPENDIX C"

44 Ohio St.2d 163

The STATE of Ohio, Appellant,

v.

KARR, Appellee.

The STATE of Ohio, Appellant,

v.

STEVENSON, Appellee,

The STATE of Ohio, Appellant,

v.

MITCHELL, Appellee

No. 75-161.

Supreme Court of Ohio.

Dec. 24, 1975.

PER CURIAM.

Defendants allege that these searches were illegal. The argument is that the warrants were issued without probable cause and, specifically, that the affidavits in the warrants failed to provide an adequate factual basis for the judges' findings of probable cause.

In each case, the affiant was a police officer, and in each case the warrant was issued on the basis of information received

from an unnamed confidential informant. In State v. Karr, the affidavit stated that: "Information received from a reliable informant, who has given reliable and factual information in the past which has led to several arrests, states that he/she has seen large quantities of miscellaneous amphetamines and barbiturates inside the above address in the past 48 hours ***."

In State v. Stevenson and State v. Mitchell, the affidavit stated that: "Information received from a reliable informant, who has given truthful and factual information in the recent past, states to the affiant that he/she has seen hallucinogens at this address within the past 48 hours."

The sole issue presented is whether the affidavits for the two warrants were sufficient for findings that probable cause to search existed.*

[1,2] Affidavits for search warrants are governed by less stringent rules thatn those dealing with the admissibility of evidence in a criminal trial, and an affidavit is not rendered deficient because it is based on hearsay statements of an unnamed informant "so long as a substantial basis for crediting the hearsay is presented." Jones v. United States (1960), 362 U.S. 257, 269, 80 S.Ct. 725, 735, 4 L.Ed.2d 697. In order for the magistrate to find a "substantial basis" for crediting such hearsay, the affidavit must satisfy the two-pronged test set out in Aguilar v. Texas (1964), 378 U.S. 108, 114 84 S.Ct. 1509, 1514, 12 L.Ed.2d 723 as follows:

"***the magistrate must be informed of some of the underlying circumstances from

which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, ***was 'credible' or his information 'reliable.'" Crim.R.41(C) sets out the same test.

[3] If the informant's tip proves to be inadequate under the Aguilar standards, then other allegations in the affidavit should be considered to determine whether the tip is adequately corroborated. Spinelli v. United States (1969), 393 U.S. 410, 89 S. Ct. 584, 21 L.Ed2d 637; United States v. Harris (1971), 403 U.S. 573, 91 S.Ct. 2075, 29 L.Ed.2d 723.

[4] To satisfy the first prong of the Aguilar test, the affidavit must show the factual basis for the confidant's information.

*The affiant in State v. Karr also requested that the search be executed in the nighttime "because of the high mobility and the amount of traffic in and out of the premises." Crim.R.41(C) provides that the issuing court may authorize a nighttime warrant "for reasonable cause shown." The Court of Appeals dismissed defendant's contention that the nighttime warrant was improper, and that issue was not raised or argued before this court. The "cause" intended to be shown by the language of the affidavit is somewhat obscure, but the posture of this case provides no basis for adequate consideration of whether the nighttime warrant was properly granted, and we express no opinion thereon.

A common and acceptable basis for the informant's information is his personal

observation of the facts or events described to the affiant. United States v. Harris, supra; Jones v. United States, supra; Rugendorf v. United States (1964), 376 U.S. 528, 84 S.Ct. 825, 11 L.Ed. 2d 887. These observations may be given added weight by the extent of the description or by corroborative police surveillance and information.

[5] In each of the affidavits herein, the affiant stated that the informant saw the drugs within the past 48 hours. This averment was a sufficient factual basis to establish that the informant spoke with personal knowledge and was a sufficient showing of the underlying facts from which the informant concluded that the narcotics were where they were purported to be. United States v. Perry (C.A. 2, 1967), 380 F.2d 356; United States v. Shipstead (C.A. 9, 1970), 433 F. 2d 368.

[6-8] The second prong of the Aguilar test is that underlying facts must be presented from which the affiant could conclude that the informant was credible or his information reliable.

It is not sufficient that the affiant swear that his confidant was reliable, when no reason is offered the magistrate in support of that conclusion. Spinelli v. United States, supra, 393 U.S. at page 416, 89 S.Ct. 584. It is not essential that the affiant swear that the informant supplied reliable information in the past (State v. Haynes [1971], 25 Ohio St.2d, 264, 267 N.E.2d 787; Harris v. United States, supra), but it is generally held that a statement that the informant has been reliable in the past is sufficient. Jones v. Crouse (C.A.10, 1971), 447 F.2d 1395, certiorari

denied, 405 U.S. 1018, 92 S.Ct. 1298, 31 L.Ed. 2d 480; United States v. Fuller (C.A. 4, 1971) 441 F.2d 755, certiorari denied, 404 U.S. 830, 92S.Ct. 73, 74, 30 L.Ed. 2d 59; United States v. Mendoza (C.A.5, 1970), 433 F.2d 891, certiorari denied, 401 U.S. 943, 91 S.Ct. 953, 28 L.Ed.2d 225, United States v. Bridges (C.A. 8, 1969), 419 F.2d 963; United States v. Sultan (C.A.2, 1972), 463 F.2d 1066 (dicta); but, see, United States v. Thornton (1971), 147 U.S. App.D.C. 114,454 F.2d 957. The fact that an informant has provided reliable information in the past gives the magistrate a definite indication of credibility. It is, of course, strongly advisable that facts as to the number of past incidents, the manner of information provided, and the degree of accuracy of the informant be included in the affidavit, in order that the magistrate be fully informed of the grounds upon which a finding of probable cause must be based. A magistrate has discretion to require such information and "may examine under oath the affiant and any witnesses he may produce." Crim.R.41(C). The affidavits herein lack much information which could have furnished a firmer basis for the magistrate's determination-information which might have been elicited by examination of the affiant or the informant. No such examination was made.

[9] As a reviewing court we are guided by the language in United States v. Ventresca, (1965), 380 U.S. 102, 108, 85 S.Ct. 741, 746, 13 L.Ed.2d 684 as follows:

"***If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and

courts in a common sense and realistic fashion. They are normally drafted by non-lawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting.

"This is not to say that probable cause can be made out by affidavits which are purely conclusory, stating only the affiant's or an informer's belief that probable cause exists without detailing any of the 'underlying circumstances' upon which that belief is based. See Aguilar v. Texas, supra. Recital of some of the underlying circumstances in the affidavit is essential if the magistrate is to perform his detached function and not serve merely as a rubber stamp for the police. However, where these circumstances are detailed, where reason for crediting the source of the information is given, and when a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense manner. Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants. Jones v. United States, supra, 362 U.S., at 270, 80 S.Ct. at 735."

[10] The affidavits in the instant cases, sparse though they may be, satisfy the test in Aguilar. No reason appears to read into Crim.R.41(C) a stricter standard, and

we cannot say that the magistrates failed to perform their detached and independent function. The preference to be accorded warrants requires that these be upheld.

The opinions of the Court of Appeals in these cases were apparently grounded in a misapprehension of three previous decisions of this court. In none of those cases did this court adopt a more stringent test for affidavits that that established in Aguilar and Spinelli. Indeed, in applying federal constitutional law, we could not have done so. Oregon v. Hass (1975), 420 U.S. 714, 95 S.Ct. 1215, 43 L.Ed. 2d 570.

In State v. Joseph (1970), 25 Ohio St. 2nd 95, 267 N.E. 2d 125, we held in per curiam opinion that an affidavit was insufficient which failed to set out any underlying facts from which it could be determined that the informants were credible or any of the facts upon which the informants based their conclusions. The affidavit was more detailed than those considered herein, but it failed to satisfy the Aguilar tests. In State v. Brehm (1971), 27 Ohio St. 2d 239, 272 N.E. 2d 122, the affidavit similarly failed to recite any facts from which a finding could be made that the informant was credible or his information reliable. It stated only that the informant had seen drugs used and sold at the address to be searched.

In State v. Haynes (1971), 25 Ohio St. 2d 264, 267 N.E. 2d 787, an issue was presented as to whether there was anything in the affidavit to indicate the credibility of the informant or the reliability of his information. The named informant had not previsouly given reliable information, but had purchased marijuana on the premises and turned it over to police officers on three occasions. The informant had identified from photographs, one of the sellers, a man whom the police knew to have been engaged in narcotics violations. In finding reasonable

grounds for the search, the court, at page 268, 267 N.E. 2d at page 790, stated:

"Although the fact that the informant has previously supplied reliable information carries some weight, the determination of reliability or credibility can not be based solely upon that fact. To so hold would necessarily do away with informants since no one could ever qualify as a reliable informant the first time. In determining the reliability of the information, the magistrate must consider the facts presented to him and if such facts would cause a reasonable man to believe there are grounds for believing that the contraband is on the premises sought to be searched, he is justified in believing in the reliability of the informant. It must be remembered that the probable cause necessary to justify the issuance of a search warrant requires less facts than are necessary for conviction, and the amount and method of proof is less strict. Jones v. United States (1960), 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed. 2d 697."

[11] The plain meaning of that language is that when an informant has not previously supplied reliable information, his credibility may be supported, or the reliability of his information corroborated, by other facts in the affidavit. It does not follow that previously supplied reliable information cannot be a sufficient basis for a magistrate to find reasonable cause that the informant is credible. For the reasons stated above, a recitation that an unnamed informant has previously supplied accurate information is sufficient to justify a finding that the informant is credible.

Accordingly, the judgments of the Court of Appeals are reversed.

Judgments reversed.

C. WILLIAM O'NEILL, HERBERT, J. J. P. CORRIGAN, STERN and PAUL W. BROWN, JJ., concur.

CELEBREZZE and WILLIAM B. BROWN, JJ., dissent.

HERBERT, Justice (concurring).

As noted in the opinions above, the reversal by the Court of Appeals of these judgments resulted from a "misapprehension" by that court of three former decisions of this court, i.e., Joseph, Haynes and Brehm. The affidavit in Joseph is readily distinguishable from those at bar, and the opinion in Haynes pointedly declares that in determining the sufficiency of search warrant affidavits, courts should not be "hypertechnical." As noted in Haynes, the amount and method of proof necessary to support issuance of a search warrant is "less strict" and requires "less facts than are necessary for conviction."

The final case relied upon below is Brehm, and it is less than realistic to characterize reliance upon that decision as misapprehension. In my view, the affidavit in Brehm should not have been found defective, and my refusal to vote for the Brehm opinion came as a result of that belief.

CELEBREZZE, Justice (dissenting).

Since the constitutional sufficiency for the issuance of the search warrants in these cases was based solely on the affidavits in support thereof, I am setting forth in their entirety these affidavits:

State v. Karr.

"Information received from a reliable informant, who has given reliable and factual information in the past which has led to several

arrests, states that he/she has seen large quantities of miscellaneous amphetamines and barbiturates inside the above address in the past 48 hours." (Emphasis added.)

The last sentence of the affidavit alleging "high mobility" as a reason for a nighttime search is eliminated since it is not an issue.

State v. Stevenson and State v. Mitchell.

"Information received from a reliable informant, who has given truthful and factual information in the recent past, states to the affiant that he/she had seen hallucinogens at this address within the past 48 hours." (Emphasis added.)

No other information was submitted to the issuing magistrate.

I agree with the majority when they say that affidavits for search warrants need not meet the tests for the admissibility of evidence and further that it is essential to the police in their exercise of ferreting out crime that they of necessity need to rely on hearsay as a major source of information. I further agree with my colleagues when they say that the "affidavits herein lack much information which could have furnished a firmer basis for the magistrate's determination ***; however, I question their resolution of the obvious doubt they express.

The much maligned rule in Aguilar v. Texas (1964), 378 U.S. 108, 84 S.Ct. 1509, 12L.Ed. 2d 723, usually referred to as the "two-pronged test" is best contained in the single paragraph, at page 114, 84 S. Ct. at page 1514, as follows:

"Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant***

the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed ***was 'credible' or his information ' reliable'.***

It is in the application of the Aguilar standard that the probative value of these affidavits glaringly fails. For although the affiant swore that his confidant was "reliable" he offered the magistrate no reason in support of that conclusion.

As Justice Frankfurther succinctly stated in the case of Jones v. United States (1960), 362 U.S. 257, 269, 80 S.Ct. 725, 735, 4 L.Ed 2d 697, a forerunner of Aguilar:

"***We held in Nathanson v. United States, 290 U.S. 41, 54 S.Ct. 11, 78 L.Ed. 159, that an affidavit does not establish probable cause which merely states the affiant's belief that there is a cause to search, without stating facts upon which that belief is based. A fortiori this is true of an affidavit which states only the belief of one not the affiant."

The majority cite further the case of United States v. Ventresca (1965), 380 U.S. 102, 85 S.Ct.741, 13 L.Ed.2d 684. And while it is basically fallacious to measure the probity of an affidavit by its verbal content, it is more difficult to equate the affidavit in question here with that in the Ventresca case. Justice Goldberg, the author of the rule in the Aguilar case, writing for the majority in the Ventresca case stated, at page 109, 85 S.Ct. at page 746:

"* * * The affidavit in this case, if read in a commonsense way rather than technically,

shows ample facts to establish probable cause * * * . The affidavit at issue here, unlike the affidavit held insufficient in Aguilar, is detailed and specific. It sets forth not merely 'some of the underlying circumstances' supporting the officer's belief, but a good many of them. This is apparent from the summary * * * and from its text which is reproduced in the Appendix." The Appendix contains a 4 1/2 page reprint of the affidavit and the facts for its basis.

With all deference, the affidavits in these cases seem hopelessly inadequate in the absence of facts to bolster their sufficiency.

I would affirm the decision below.

WILLIAM BROWN, J., concurs in the foregoing dissenting opinion.